FIL

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner,

against—

THE CITY OF NEW YORK,
Respondent.

In the Matter of

The Petition of CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge.

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Circle Line Sightseeing Yachts, Inc., owner of the motor vessel SIGHTSEER VIII, prays that a writ of

certiorari issue to the United States Court of Appeals for the Second Circuit to review judgments of that Court entered on December 6, 1960, modifying interlocutory decrees entered in these causes in the United States District Court for the Southern District of New York and remanding the limitation cause for further proceedings.

Opinions of the Courts Below

The opinion of the District Court (R. 1-12a) is not reported. The opinion of the Court of Appeals (R. II-103a; App. A-1) is reported at 283 F. 2d 811.

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit was filed November 9, 1960 (R. II-103a; App. A-1). Within the period of time prescribed by Rule 25 of the Rules of the Court of Appeals a petition for rehearing was filed by petitioner, which petition was denied by order of the Court of Appeals dated December 6, 1960 (R. II-126a).

Jurisdiction of this Court to review the judgments of the Court of Appeals by writ of certiorari is invoked under Section 1254(1) of Title 28 U. S. Code.

The Questions Presented for Review

1. Whether a Court of Appeals, in reviewing an admiralty decree and upon determining that an issue of fact that had not been presented to the District Court on the trial is material to the controversy, may find facts from the record of the trial in which that factual issue had not been litigated; or should, under *McAllister* v. *United States*,

348 U. S. 19, remand the cause to the District for appropriate findings.

2. Whether a Court of Appeals, in reviewing an admiralty decree, may consider a question presented for the first time on appeal, and hold the District Court in error with respect to the question that had not been presented for its consideration; or should remand the cause to the District Court for appropriate proceedings.

3. Whether, in reviewing a decree in a cause of marine collision, a Court of Appeals, upon determining that a factual issue of statutory violation that had not been presented to the District Court on the trial is material to the controversy and upon finding facts from the record of the trial in which that factual issue had not been litigated, may then conclude from that record that a party to the collision, exonerated by the District Court's decree, had violated the statutory obligation and that such party, found in fault for the first time upon appellate review, had failed on the District Court trial to sustain the burden, imposed by the rule stated in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, of proving that the statutory violation could not have caused or contributed to the collision and was thus in partial blame for the collision, despite the fact that the party newly held in blame had not, until the decision of the Court of Appeals, had cause to undertake the burden imposed by the Pennsylvania rule; or should, upon determining the existence of a potential statutory fault of a party exonerated by the District Court decree, remand the cause to the District Court for plenary proceedings consistent with the doctrine of *The Pennsylvania*, thereby to afford that party a hearing on the issue of statutory fault and, if need be, the opportunity to undertake and sustain the burden imposed by the Pennsylvania rule.

Statement of the Case

A collision September 6, 1956 between petitioner's sightseeing vessel and the rotating span of respondent's Madison Avenue Bridge caused damage to both bridge and vessel and injuries to several passengers on the vessel. Pursuant to Section 1333 of Title 28, U. S. Code, petitioner filed a libel in admiralty against respondent in the United States District Court for the Southern District of New York to recover its losses, and commenced in that Court a proceeding under Section 185 of Title 46, U. S. Code, seeking exoneration from or limitation of liability on its part for losses to others.

The proceedings were consolidated for trial. The District Court, having concluded that the casualty occurred without fault on the part of petitioner and solely as a result of the negligent conduct of respondent's bridge operator in opening the bridge into the path of the oncoming vessel (R. I-15a), entered decrees exonerating petitioner from liability (R. I-6a) and awarding it recovery of its damages from respondent (R. I-4a). Further, it took the precautionary measure of finding that the accident happened without managerial fault on the part of petitioner and therefore concluding that petitioner would be entitled to limitation of liability under Section 183 of Title 46, U. S. Code, in the event that an appellate court should disagree with its conclusion as to petitioner's right to exoneration (R. I-18a).

The Court of Appeals approved the District Court's conclusion that the bridge operator's failure to protect petitioner's vessel on her attempted passage through the bridge draw was a proximate cause of the casualty, and added that an underlying cause was the neglect of respondent

effectively to devise a means of warning vessels of a prospective opening of the bridge (R. II-106a; App. A-3).

It found, however, that petitioner was negligent in failing to maintain a proper lookout on its vessel (R. II-108a; App. A-5). On that ground it ordered the decrees modified to deny petitioner exoneration from liability and to provide for division of damages, and remanded the limitation cause with instructions that the District Court, in view of the Court of Appeals' finding of petitioner's negligence as to lookout, review its own finding of petitioner's lack of managerial fault (R. II-110a; App. A-7).

In holding petitioner *in pari delicto* with respondent for the accident, the Court of Appeals drew from the trial record its own finding that the vessel's lookout was in fact inadequate, and to that finding applied the rule announced by this Court in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, under which, as the Court of Appeals said, "failure to maintain a proper lookout placed upon the negligent party the burden of showing that such failure did not cause and could not have caused the accident" (R. II-109a; App. A-5).

But the question of petitioner's lookout had not been raised in the District Court. Respondent did not contend on the trial that there was inadequacy of lookout. The District Court was not asked to consider and determine that issue, and no mention of it was made in the memorandum decision (R. I-12a) or in the findings of fact and conclusions of law (R. I-19a).

Until the Court of Appeals determined *de novo* that untried factual issue, petitioner had no reason to assume the burden of proving that failure as to lookout—if there were failure—could not have caused or contributed to the collision. When the Court of Appeals made that determination, it concluded from a trial record that had not,

been and could not have been fairly made that petitioner had failed to sustain a burden that it had not had the opportunity to assume.

I

The decision of the Court of Appeals is in conflict with the decision of this Court in McAllister v. United States, 348 U. S. 19.

In *McAllister* v. *United States*, 348 U. S. 19, this Court ruled that a factual finding of an admiralty court, sitting without a jury, may be disturbed on appeal only if it is "clearly erroneous," and that such clear error is present only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Implicit in that determination is the principle that the admiralty trial court is presumptively correct in the performance of its function as trier of the facts, not only as to the facts that it finds, but also as to its appraisal of the factual issues to be determined.

Here the Court of Appeals, since it was of the opinion that a factual issue not considered below was material to the controversy, should properly have remanded the cause to the trial court for appropriate findings. It was in clear error under the McAllister rule in extracting its own findings from a trial record in which that factual issue had not been explored.

II

The Court of Appeals was in error in modifying a decree on grounds that had not been raised in the District Court.

The Court of Appeals, after making its independent findings of fact with respect to lookout, concluded that peti-

tioner had been negligent. In doing so, the Court violated the principle, universally honored in the federal appellate courts, that an issue not decided in the District Court may not be raised for the first time on appeal.

As the Court of Appeals for the Eighth Circuit has said, in *Weiss* v. *Duro Chrome Corp.*, 207 F. 2d 298, 300:

> "The trial Court having had no opportunity of passing upon the question now for the first time presented cannot be charged with error in failing to do that which it was not requested to do."

To the same effect are the decisions of the Court of Appeals for the District of Columbia Circuit in *Brown* v. *Rudberg*, 171 F. 2d 831, and *American Air Export & Import Co.* v. *O'Neill*, 221 F. 2d 829.

III

The decision of the Court of Appeals is in conflict with the decision of this Court in The Pennsylvania, 86 U. S. (19 Wall.) 125.

In *The Pennsylvania*, 86 U. S. (19 Wall.) 125, this Court, concerned with the effect of violation by one of two colliding vessels of a statutory mandate regarding sound signals in fog, announced a most significant doctrine of admiralty, 86 U. S. 125, 136:

> "But when, as in this case, a ship at the time of a collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

That doctrine contemplates a *presumption*, which under circumstances of statutory violation causes imposition of a proof burden on the offending vessel and casts liability upon her in the event that burden is not sustained. But *The Pennsylvania* established that the doctrine is designed to apply only to cases where the issue of statutory violation is in actual litigation in the trial court: there the statutory issue was fairly raised, and the party charged with fault sought unsuccessfully to bear the burden of the rule.

This Court has not suggested that an appellate court may, at once, detect a statutory fault not litigated below and on an empty record conclude forthwith that the party newly held in blame had failed to sustain the burden created by a presumption that would have arisen only had the point earlier been in issue.

But the Court of Appeals did that in this instance. Although the factual issue as to adequacy of lookout had not earlier been raised, the Court of Appeals entertained it, determined in a manner adverse to petitioner, and thereupon concluded that petitioner had failed to sustain the Pennsylvania burden.* In doing so, it effectively foreclosed petitioner from exercise of the right secured to it by this Court's doctrine to show that a statutory default—if such there was—could not have been related causally to the accident, *The Farragut*, 77 U. S. (10 Wall.) 334; *The Dexter*, 90 U. S. (23 Wall.) 69, and thus denied to petitioner the process that this Court has held to be due.

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*The reason given by the Court of Appeals for that conclusion was that ". . . it is quite possible that a lookout with no other duties could have seen the opening bridge earlier and either avoided the accident or at least diminished its severity" (R. 109a; App. A-6).

Conclusion

Petitioner respectfully submits that the reasons stated in this petition are of importance sufficient to justify review of the judgment of the Court of Appeals for the Second Circuit by writ of certiorari.

It prays, therefore, that the writ issue, and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and these causes remanded for further proceedings consistent with the doctrine stated by this Court in *The Pensylvania*, 86 U. S. (19 Wall.) 125, and such other and further relief as to this Court may seem proper.

Respectfully submitted,

WARNER PYNE,
WILLIAM A. WILSON,
Counsel for Petitioner.

ALBERT ROBIN,
Of Counsel.

Dated New York, New York,
March 1, 1961.